IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 11TH DECEMBER 2006 / 20TH AGRAHAYANA 1928

CRP.No. 560 of 2003()

OS.156/1996 of ADDL.SUB COURT, PALAKKAD

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REVN. PETITIONER: PETITIONERS/PLAINTIFFS

1. **CHAMIYAPPA MANNADIAR, S/O. NARAYANA MANNADIAR, AGED 69, DOOR NO.5/355 (OLD 5/217), CHUNGAMKALAM, NEAR RTO CHECK POST, MANNOOR P.O., RAMAPATNAM VILLAGE, POLLACHI TALUK.**

2. **CHANDRIKA, W/O.CHAMIYAPPA MANNADIAR, AGED 52, RESIDING AT -DO- -DO- IN -DO- -DO-**

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.P.B.KRISHNAN

RESPONDENTS: DEFENDANTS

1. **DANAVAN, S/O.RAJAPPAN, AGED 46, PARAMBATHERIL HOUSE, GOPALAPURAM, CHITTUR TALUK, PALAKKAD DISTRICT.**

2. **ARUN SAGAR, S/O.DANAVAN, AGED 17(MINOR) RESIDING AT -DO- -DO- IN -DO- -DO- REPRESENTED BY FATHER AND GUARDIAN RESPONDENT NO.1.**

3. **AKITHA ALIAS AMRITHA, D/O.DANAVAN, AGED 15 (MINOR) RESIDING AT -DO- -DO- IN -DO- -DO- REPRESENTED BY FATHER AND GUARDIAN RESPONDENT NO.1.**

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11/12/2006, ALONG WITH OP NO. 6574 OF 2003 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

C.R.P.NO.560 OF 2003 (G)
and
O.P.NO.6574 OF 2003 (G)

Dated this the 11 th day of December, 2006.

O R D E R

Can a copy of an insufficiently stamped instrument be impounded under Section 33 of Kerala Stamp Act or the deficit stamp duty and penalty be realised? Whether a provision in the instrument creating an oblgation to pay money, but not a fixed sum, makes the instrument a bond as defined under section 2(a) (i) of Kerala Stamp Act? These are the interesting questions to be settled in this case.

2. Petitioners are husband and wife. They are the plaintiffs in O.S.156/1996 on the file of Sub Court, Palakkad. Respondent in the C.R.P are the defendants in that suit. First respondent in the C.R.P is the plaintiff in O.S.284/95 and O.S.543/1998 on the file of the same court. Petitioner filed O.S.156/1996 for realisation of Rs.5.2 Lakhs due under an agreement for sale dated 3.4.1995. First respondent filed O.S.284/1985 for realisation of the amount paid under the agreement contending that it was not actually an agreement for sale but a loan transaction. O.S.43/1998 was filed for return of the amount on the

basis of an agreement dated 5.4.1995. In O.S.156/1996, when Ext.P1 agreement dated 3.4.1995 was sought to be marked as an exhibit, it was contended by respondents that the instrument was not property stamped and it is not an agreement but a bond and sufficient stamp duty was not paid and being an insufficiently stamped instrument, it cannot be admitted in evidence. Learned Sub Judge, as per impugned order in C.R.P.560/03 dated 14.2.03 held that Ext.P1 is an agreement as well as a bond and it is chargeable with duty as provided under Section 5 of Kerala Stamp Act. The said order is challenged in C.R.P.560/03. In O.S.284/95, when the very same document was sought to be marked, under Ext.P2 order passed on the same day, learned Sub Judge held that the document is both an agreement and bond and is chargeable with duty as provided under section 5 of Kerala Stamp Act. Ext.P2 order is challenged in O.P.6574/03, filed under Article 227 of Constitution of India.

3. Learned counsel appearing for petitioners and respondents were heard.

4. Learned counsel appearing for petitioners relied on the

decision of Apex court in Jupudi Kesava Rao v. Pulavarthy Venketa Subbarao (AIR 1971 SC 1070) and argued that Ext.P1 is not an instrument as defined under Section 2(j) of Kerala Stamp Act and it is only a copy of the agreement which was retained by the petitioners as is clear from the document itself and the original was handed over to respondents and they did not produce the same and therefore copy of an instrument cannot be impounded and for that sole reason the orders are to be quashed. Learned counsel also argued that the instrument does not provide for payment of money and as is clear from the contentions of the parties, originally an agreement for sale was executed on 31.3.95 where only first plaintiff was a party and he agreed to sell 8.4 acres of land for a consideration of 1.5 Lakhs per acre and as a part of the property covered by the agreement belongs to his wife, second plaintiff, Ext.P1 agreement was executed on 3.4.1995 providing for execution of a sale deed in respect of 8.4 acres after receiving consideration for 5 acres of land due to the pendency of ceiling case before this court. The instrument provides that if plaintiff succeed in that ceiling case and their right is upheld by this court, respondents have to pay the balance sale consideration. It was argued that the considerations so payable is not a fixed sum, as it

depends on the result of the ceiling case and therefore Ext.P1 is not a bond as defined under Section 2(a)(i) of Kerala Stamp Act. Relying on the decision of the Lahore High Court in *Tej Ram and another v. Maqbal Shah and others (AIR 1928 Lahore 370)* and Apex Court in *The Member, Board of Revenue v.Arthur Paul Benthall (AIR 1956 SC 35)* it was argued that section 5 of the Kerala Stamp Act does not apply to the instrument as it is a single transactions and the order of the learned Sub Judge treating the instrument attracting Section 5 of Kerala Stamp act is unsustainable.

5. Learned counsel appearing for respondents relying on the decision of the Apex Court in *State of Kerala v. McDowell and Co. Ltd (1994 (1) KLT 802)* argued that the instrument by itself creates an obligation to pay money being the value for the remaining extent of the property covered by the instrument, less the value paid for five acres at the rate shown in the instrument making it clear that in case petitioners did not succeed in the ceiling case pending before this court, that provision would be void and therefore it is a bond as rightly found by the trial court. Relying on the decision of this court in *Varghese V. State of Kerala (1989 (1) KLT 24),* learned counsel further

argued that when an instrument is sought to be marked as evidence and court is satisfied that the instrument is insufficiently stamped, court is bound to act as provided under section 33 and as the instrument is a bond, trial court rightly found that the instrument is not sufficiently stamped and the order cannot be challenged. Relying on the decision of this court in *Asokan v. Deputy Collector (1995 (2) KLT 292)* it was argued that courts power to impound an instrument cannot be challenged on the ground that parties to the instrument are not before the court or that the document was not produced by the petitioners or that the original was not produced before the court.

6. A bond has been defined in sub clause 1 of section (a) of (2) of Kerala Stamp Act, as follows:-

"any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be".

7. Apex court in state of Kerala v. McDowell and Co. Ltd (supra), construing the said provision held that definition must be read as it stands and nothing may be read in or implied and the word

"whereby" in the section must be read as by which Their Lordship held,

> " in our view, the definition of bond in sub-clause (1) of clause (a) of Section 2 of the Kerala Stamp Act is clear and unambiguous. It must be read as it stand, nothing may be read in or implied. The word 'whereby' must be read as meaning what it ordinarily does, namely, 'by which'. An instrument, therefore, by which a person puts himself under an obligation to pay a sum of money to another on condition that the obligation shall be void if some specific act is, or is not, performed is a bond. The only question to pose is, has the executant of the instrument put himself under an obligation, or bound himself, to pay a sum of money to another, the obligation to be void under specified circumstances? If the

executant can be sued for that sum of money only upon the strength of the instrument, the instrument is a bond".

8. To resolve the dispute Ext.P1 the agreement is to be read as a whole. It is to be seen whether the instrument creates an obligation to pay a sum of money and also provides that the obligation will be void if some specified act is or is not performed.

9. Ext.P1 is a copy of an agreement executed between petitioners and the first respondent. Under Ext.P1, petitioners agreed to sell 8.4 acres of land belonging to them for a consideration of Rs.1,90,000/- per acre. It specially provides that out of the sale consideration, first respondent need pay only the consideration for five acres of land, as the remaining extent of property is involved in a ceiling case then pending before this court. Evidently, if the ceiling case is decided against petitioners, first respondent inspite of the assignment deed will not get any right over that extent of the property. Parties, therefore on their wisdom, chose to provide that the liability of first respondent to pay the consideration for that extent of the property, which depends on the fate of the ceiling case, arise

only after the final decision in the ceiling case. It was therefore provided that part of the consideration, depending on the decision in ceiling case, need not be paid at the time of execution of the sale deed, though the deed is for the entire extent. Payment for that extent of the property is to be made only after petitioners succeed in the ceiling case. The instrument creates an obligation to pay the consideration for the balance extent depending on the decision in the ceiling case. It is clear that the said obligation will crystalise only on the final decision of the ceiling case. If this court upholds the case of the excutants of the instrument in respect of the whole claim, the consideration payable will be the value for 3.4 acres at the rate of rs.1,90,000/- per acre. If part of the claim alone is upheld, the quantum of consideration will proportionately be reduced. If so, can it be said that the instrument creates an obligation to pay, an ascertained sum of money on which stamp duty is to be paid. Depending on the decision of the court in the ceiling case, the liability or obligation may be nil or a maximum of consideration for 3.4 acres of at the rate of Rs.1,90,000/- per acre. If so the instrument thereby does not create an obligation to pay a particular sum of money. True, the instrument satisfies part of the definition of a bond as

defined in Section 2(a) (i) of Kerala Stamp act, as the said obligation is treated void, if the ceiling case end against the petitioners. But the question is whether for that reason, the said obligation to pay the balance consideration, is a liability to pay the "money" as defined under section 2(a) (i) of Kerala Stamp Act. The definition of section 2 (a)(i) provides that by the instrument the person must oblige himself to pay money. That money has to be a fixed sum and cannot be a sum which has to be ascertained at a later point of time depending on other contingencies as in this case. Though Ext.P1 provides for payment of balance sale consideration, the quantum of balance consideration definitely depends upon the balance extend of the property, excluding 5 acres conveyed. Under the instrument, balance extent depends upon the decision of this court in the ceiling case. As rightly argued by learned counsel appearing for the petitioner, if this court upholds only part of the claim made by petitioners, it would definitely reduce the liability to pay money, provided in the instrument. If so, it cannot be said that the instrument provides for payment of money on which stamp duty could be charged. Therefore on that ground itself, it is to be held that the document is not a bond.

10. Moreover as rightly pointed out by learned counsel appearing for petitioner, trial court is competent to impound an instrument as defined under section 2(j) of Kerala Stamp Act, corresponding to section 2(14) of the Indian Stamp Act.

Section 2(j) of Kerala Stampt Act defines an "instrument" includes every document by which any right or liability is or purports to be created,transferred, limited, extended, extinguished or recorded but does not include a bill of exchange, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share of debenture, proxy and receipt.

11. Section 34 mandates that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person authorised to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such an instrument is duly stamped except as provided under the proviso enabling the party to get it admitted on payment of deficit stamp duty payable and the penalty as provided thereunder. Section 33 provides that every person having by law or consent of parties authority to receive evidence and every person in charge of public office except a

police officer, when an instrument is produced or comes in the performance of his functions, appears to him that the instrument is insufficiently stamped, shall impound the same. Section 37 provides how an instrument which was impounded under section 33 is to be dealt with. Under sub section 1 of section 37, when an insufficiently stamped instrument is admitted, after payment of deficit stamp duty payable and the penalty as provided, the person so impounding the instrument shall send to the Collector an authenticated copy of such instrument, together with a certificate stating the amount of duty and penalty levied and shall also send such amount to the Collector. If the deficit duty and penalty has not been paid, sub section mandates that, the person impounding the instrument shall send it to the collector. Section 39 deals with the powers to stamp the instrument impounded. The provisions therefore make it clear that the instrument to be examined under section 33 and impounded, is the original instrument itself and not a copy of the instrument. Though section 33 enables the court to receive the deficit duty payable with the penalty payable, if it is not paid, sub section 2 of section 37 mandates that the instrument is to be send to the Collector who is bound to stamp the instrument as provided under Section 39. That cannot be on the copy of an

instrument itself but the instrument which could only be the original instrument.

12. The judicial committee of privy council in *Raja of Bobbihi V. Inuganti Chiria Sitaramaswami Guru* (1900 ILR 23 Mad. 49) considered the question whether a copy of the instrument can be tendered as secondary evidence, when the original instrument was shown to have been insufficiently stamped. The judicial committee held,

> " These clauses throughout deal with and exclusively refer to the admission as evidence of original documents, which at the time of their execution, were not stamped at all or were insufficiently stamped. It is only upon production of the original writ, that the Collector has given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must in that case, perform by

writing an indorsement, upon the writ submitted to him, which then, and not till then becomes probative in law".

13. Apex court in *State of Bihar V. Karam Chand* (AIR 1962 SC 110) followed that decision and laid down that the position is well settled that a copy of the instrument cannot be validated by payment of stamp duty or deficit stamp duty and penalty.

14. Section 55 of Indian Stamp Act correspond to Section 34 of Kerala Stamp Act. Apex court in Jupudi V. Pulavarthi (AIR 1971 SC 1070) construing section 35 of Indian Stamp Act held that the bar imposed under Section 35 is on the reception of any but the original instrument and forbade the reception of secondary evidence and Section 36 (corresponding to Section 35 of Kerala Stamp Act) only lifted that bar in the case of an original unstamped or insufficiently stamped document to which no exception as to admissibility was taken at the first stage and did not create any exception to a copy of the document. Their lordship held,

" The first limp of Section 35 clearly shut out from evidence any

instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary

evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by section 63 of the Indian Evidence Act would not fulfill the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a instrument which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2 (14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a

copy of a document as an instrument

for the purpose of the Stamp Act.

If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceedings. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped."

15. In view of the settled legal position, when a copy of the instrument as in this case was produced, court has no power to impound the copy of the instrument as provided under section 33. For that reason alone, the order of the learned Munsiff is bad. The learned counsel appearing for respondent submitted that if such a view is taken it would allow parties to shield the original insufficiently or unstamped instrument from production in the case and only copy will be produced. I find no reason for such an apprehension. If it is shown that the original instrument (document) was either not stamped or insufficiently stamped, as declared by the Apex court in Jupudi's case (supra) the copy of that instrument cannot be admitted as secondary evidence. Hence no party can escape from the bar provided under Section 33, by producing copy of the instrument which is not stamped or not sufficiently stamped.

16. From the provisions of the Act and the decisions of the Apex Court it is clear that copy of a instrument cannot be impounded under Section 33 of Kerala Stamp Act and only the original instrument can be impounded. By paying the deficit duty payable, with the penalty payable ,only the original instrument could be admitted in

evidence. A copy of an unstamped or insufficiently stamped instrument cannot either be impounded or admitted as additional evidence.

In view of the earlier findings, the orders of Munsiff that Ext.P1 document is a bond is set aside.

M.SASIDHARAN NAMBIAR,
JUDGE.

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